

**United States Department of Labor
Employees' Compensation Appeals Board**

D.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hartford, CT, Employer**

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**Docket No. 16-0059
Issued: March 14, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 13, 2015 appellant filed a timely appeal from an August 5, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish a schedule award.

On appeal appellant contends that the second opinion examination was very minimal and the corresponding report lacked probative value in establishing an impairment rating. She argues that her doctor's findings were consistent with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) and established her entitlement to a schedule award for eight percent permanent impairment of the cervical spine.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 14, 2013 appellant, a 46-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury on December 20, 2012 as a result of lifting mail packages in the performance of duty.

By decision dated June 21, 2013, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay (COP) or challenge the case, payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim because the medical bills had exceeded \$1,500.00. OWCP advised that it formally adjudicated the claim and accepted cervical radiculopathy, left.² Appellant returned to light-duty work on June 30, 2014.

On July 31, 2014 appellant filed a claim for a schedule award (Form CA-7). A May 8, 2013 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated multilevel disc abnormalities, most pronounced at C4-5, with a left-sided disc extrusion noted and mild-to-moderate narrowing of the spinal canal. An August 7, 2013 left shoulder MRI scan revealed acromioclavicular (AC) joint degenerative changes and no rotator cuff tear. A February 20, 2014 MRI scan of the cervical spine showed minimal degenerative disc disease without significant neural foraminal or canal compromise.

In reports dated January 22 through December 2, 2014, Dr. Howard Lantner, a Board-certified neurosurgeon, opined that appellant sustained a work-related injury on December 20, 2012 and developed neck soreness and constant left trapezius pain radiating into the left arm and all fingers, especially her thumb with associated numbness and tingling. Appellant's left arm became tired when she tried to raise it above her head and she noticed weakness in the left hand. Dr. Lantner's examination findings included good range of motion of the cervical spine, moderate tenderness on palpation to the cervical spine, left trapezius, and shoulder, and pain with passive range of motion to the left shoulder. He found no evidence of upper or lower extremity myelopathy, Hoffman's, or clonus. Dr. Lantner diagnosed left arm pain secondary to C4-5 disc protrusion/extrusion with likely a small component related to her left shoulder. He concluded that appellant's cervical spine was contributing to her left arm pain and weakness although there was a small component that may have been related to her left shoulder.

On August 28, 2014 Dr. Lantner concluded that appellant had reached maximum medical improvement in March 2014 and opined that she had eight percent permanent impairment of her cervical spine due to the December 2012 work injury. On November 5, 2014 he found that appellant had "painless range of motion of both shoulders and her neck show[ed] no scars or spasms." Appellant had full power in both deltoids, biceps, triceps, finger flexors, and abductors. She ambulated without difficulty and had no sense of myelopathy. Dr. Lantner ruled out a cervical strain with radiculitis and released appellant to work with a 25-pound lifting restriction.

² OWCP previously accepted a thoracic back strain (date of injury April 28, 1999) under File No. xxxxxx497, a cervical strain (date of injury May 21, 2003) under File No. xxxxxx432, administratively accepted for benefits up to \$1,500.00 for a forehead contusion (date of injury May 17, 2010) under File No. xxxxxx152, and administratively accepted for benefits up to \$1,500.00 for a left foot injury (date of injury July 18, 2012) under File No. xxxxxx075. These other claims are not currently before the Board.

Appellant accepted a light-duty job offer as a modified mail handler with a 25-pound lifting restriction on December 4, 2014.

OWCP referred appellant to Dr. Steven Silver, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her permanent impairment. In his February 17, 2015 report, Dr. Silver reviewed a statement of accepted facts, appellant's medical history, and the medical evidence of record. He conducted a physical examination and found full range of motion of the cervical spine in terms of flexion, extension, lateral bend, and lateral rotation, noting that there was pain with compression. Appellant had full strength of the left shoulder, elbow, and wrist musculature and no interosseous weakness. There was mild tenderness in the posterior aspect of the left trapezius, but no sensory deficit of the upper extremities. Appellant's biceps, triceps, and brachioradialis jerks were brisk and symmetrical. Dr. Silver diagnosed degenerative disc disease of the cervical spine with a temporary exacerbation, as well as cervical radiculopathy based on appellant's history. He opined that appellant had reached maximum medical improvement as of April 2014 when Dr. Lantner asserted that no further conservative measures would effectuate resolution of her difficulties. Dr. Silver found no objective neurological deficits and concluded that appellant had no ratable impairment under the July/August 2009, *The Guides Newsletter*.

On May 14, 2015 OWCP medical adviser, Dr. Henry Magliato, a Board-certified orthopedic surgeon, reviewed the evidence of record and found that Dr. Silver performed an impairment rating for appellant's left arm using the July/August 2009, *The Guides Newsletter*, as he had been instructed. He indicated that he was asked to provide an opinion as to appellant's left upper extremity impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Magliato asserted that Dr. Silver reported no objective findings upon examination of appellant's left arm and as there were no abnormal neurological findings, he could not use the tables in the A.M.A., *Guides* for peripheral neuropathy and concluded that appellant had no ratable impairment. He concurred with Dr. Silver and explained that, if there were no objective neurological findings in the extremities, then appellant's permanent impairment rating would equal zero. Dr. Magliato determined that appellant had reached maximum medical improvement as of February 17, 2015, the date of Dr. Silver's report.

In a June 26, 2015 letter, OWCP requested a supplemental report from Dr. Lantner describing the objective evidence which supported any abnormal neurological findings upon examination of appellant and explaining how he calculated the percentage of impairment by using applicable tables found in the A.M.A., *Guides*. It advised Dr. Lantner that schedule awards were not available for impairment of the spine, but such awards could be paid for impairment of the upper or lower extremities caused by an injury to a spinal nerve.

In his July 14, 2015 supplemental report, Dr. Lantner explained that he assigned an eight percent permanent impairment rating to appellant "entirely based on her subjective complaints as there were no objective findings." He noted that he also assigned a 25-pound permanent lifting restriction "also entirely due to her subjective complaints with no objective findings to support this." Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Lantner found that appellant had "anywhere from a zero percent to an eight percent impairment rating" and he assigned her the eight percent permanent impairment rating of the cervical spine, not of the upper extremity based on Table 17-2, page 564, for her neck pain with no objective findings on examination.

By decision dated August 5, 2015, OWCP denied appellant's schedule award claim as the medical evidence did not establish a ratable impairment of a scheduled member.

LEGAL PRECEDENT

The schedule award provision of FECA,³ and its implementing federal regulation,⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.⁷ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁸ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, the July/August 2009, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.⁹

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden to prove that the condition for which a schedule award is sought is causally related to his or her employment.¹⁰

ANALYSIS

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment to a scheduled member of the body causally related to the December 20, 2012 employment injury. OWCP accepted appellant's claim for cervical radiculopathy, left.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁸ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

⁹ *Supra* note 6 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁰ *See Veronica Williams*, 56 ECAB 367 (2005).

However, the medical evidence of record does not establish that she sustained permanent impairment to her left upper extremity due to the accepted cervical condition.

OWCP referred appellant to Dr. Silver, a Board-certified orthopedic surgeon, to determine the nature and extent of any employment-related impairment. The Board finds that OWCP's medical adviser, Dr. Magliato, properly reviewed the medical record and found no basis for rating impairment to a scheduled member of the body.¹¹ He reviewed the February 17, 2015 assessment of Dr. Silver, who found full range of motion of the cervical spine, full strength of the left shoulder, elbow, and wrist musculature, and no sensory deficit of the upper extremities. As Dr. Silver found no objective neurological deficits, he concluded that appellant had no ratable impairment under *The Guides Newsletter* dated July/August 2009. On May 14, 2015 Dr. Magliato concurred with Dr. Silver and explained that, if there were no objective neurological findings in the extremities, then appellant's permanent impairment rating would equal zero. He determined that appellant had reached maximum medical improvement as of February 17, 2015, the date of Dr. Silver's report. The Board finds that the OWCP medical adviser properly concluded that there was no medical evidence of impairment to the left upper extremity resulting from the accepted conditions and that, therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

FECA does not authorize schedule awards for loss of use of the spine.¹² A claimant may still be entitled to an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The Guides Newsletter*.¹³ In his July 14, 2015 supplemental report, Dr. Lantner explained that he assigned an eight percent permanent impairment rating to appellant "entirely based on her subjective complaints as there were no objective findings." He rated appellant under Table 17-2, *Cervical Spine Regional Grid*, on page 564 of the A.M.A., *Guides*. Having cited Table 17-2, Dr. Lantner concluded, with no explanation, that appellant had an eight percent impairment of the left upper extremity. Table 17-2 addresses whole person impairment of the spine, not upper extremity impairment.¹⁴ In its June 26, 2015 schedule award development letter, OWCP provided Dr. Lantner clear instructions regarding the OWCP-approved methodology for rating spinal nerve extremity impairment. Dr. Lantner failed to utilize the proper standard. The Board finds that Dr. Lantner's impairment rating is inconsistent with OWCP protocols and the A.M.A., *Guides*. Consequently, appellant failed to establish that she has a ratable impairment of a schedule body member.¹⁵

¹¹ The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the examining physician to determine the permanent impairment. See *supra* note 6 at Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.200.4 (October 1990); *Tommy R. Martin*, 56 ECAB 273 (2005).

¹² See *M.R.*, Docket No. 14-833 (issued September 9, 2014).

¹³ See *supra* note 9.

¹⁴ See *L.T.*, Docket No. 15-423 (issued March 26, 2015). See *supra* note 7.

¹⁵ *Id.* See *J.Q.*, 59 ECAB 366 (2008) (when the examining physician does not provide an estimate of impairment that conforms to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by an OWCP medical adviser).

Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or *The Guides Newsletter*, addressing how she has a ratable impairment of a schedule body member. Accordingly, the weight of the medical opinion evidence is accorded to Dr. Magliato's May 14, 2015 report in which he interpreted the clinical findings of and Dr. Silver's February 17, 2015 report.

On appeal appellant contends that the second opinion examination was very minimal and the corresponding report lacked probative value in establishing any type of impairment rating. She argues that her doctor's findings were consistent with the A.M.A., *Guides* and established her entitlement to a schedule award for eight percent permanent impairment of the cervical spine. Based on the findings and conclusions stated above, the Board finds appellant's arguments are not substantiated.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board